

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF NEVADA

3 LAS VEGAS, NEVADA

4 In re: THE RHODES COMPANIES, ) E-Filed: 08/08/11  
5 LLC, )  
6 Debtor. )  
7 ) Case No.  
8 ) BK-S-09-14814-LBR  
9 ) Chapter 11

10  
11 TRANSCRIPT OF PROCEEDINGS  
12 OF  
13 CONTINUED STATUS HEARING  
14 RE: OBJECTION TO CLAIM 61  
15 OF COMMERCE ASSOCIATES, LLC, NO. 1416  
16 AND  
17 OBJECTION TO CLAIM 814-33 OF JAMES RHODES, NO. 1466  
18 AND  
19 ARGUMENT RE: MOTION TO RECONSIDER ORDER SUSTAINING  
20 REORGANIZED DEBTOR'S OBJECTION TO JAMES RHODES' ENTITLEMENT  
21 TO THE TAX CLAIM FOUND IN PROOF OF CLAIM NO. 814-33, NO. 1431  
22 VOLUME 1  
23 BEFORE THE HONORABLE LINDA B. RIEGLE  
24 UNITED STATES BANKRUPTCY JUDGE

25 Tuesday, August 2, 2011

9:30 a.m.

26 Court Recorder: Helen C. Smith

27 Proceedings recorded by electronic sound recording;  
28 transcript produced by transcription service.

## 1 APPEARANCES:

2 For the Reorganized ABID QURESHI, ESQ.  
3 Debtor: MEREDITH A. LAHAIE, ESQ.  
4 Akin, Gump, Strauss, Hauer & Feld, LLP  
One Bryant Park  
New York, New York 100365 For James Rhodes: KEVIN N. ANDERSON, ESQ.  
6 Fabian & Clendenin  
215 South State Street  
7 Suite 1200  
Salt Lake City, Utah 841118 For Commerce TRACY A. DiFILLIPPO, ESQ.  
9 Associates, LLC: Jones Vargas  
3773 Howard Hughes Parkway  
10 Third Floor South  
Las Vegas, Nevada 89169

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1 (Court convened at 09:35:41 a.m.)

2 THE CLERK: All rise. Bankruptcy court is now in  
3 session.

4 (Colloquy not on the record.)

5 THE COURT: Be seated.

6 (Colloquy not on the record.)

7 THE COURT: All right. Rhodes.

8 Appearances, please.

9 MR. QURESHI: Good morning, your Honor. For the  
10 record, on behalf of the reorganized debtors, Abid Qureshi and  
11 Meredith Lahaie from Akin, Gump, Strauss, Hauer & Feld.

12 MR. ANDERSON: Good morning, your Honor.

13 Kevin Anderson, Fabian & Clendenin, on behalf of Mr. Rhodes.

14 THE COURT: Okay.

15 MS. DiFILLIPPO: Good morning, your Honor.

16 Tracy DiFillippo on behalf of the creditor,  
17 Commerce Associates.

18 THE COURT: Okay. So what's the story with  
19 Commerce Associates? That's the first one we have on our  
20 calendar.

21 MS. DiFILLIPPO: Your Honor, I believe we've come to  
22 an agreement on Commerce Associates, the fact that everything  
23 is an unsecured claim. We are just now working on the amount.

24 I received the documentation from the reorganized debtors  
25 yesterday, so I just need my client to verify that, and that's

1 where we're at.

2 THE COURT: Okay. All right. Thank you. So do you  
3 need a --

4 MS. DiFILLIPPO: Thank you.

5 THE COURT: You don't need a continued hearing date,  
6 correct?

7 MS. DiFILLIPPO: No.

8 MR. QURESHI: I don't think so, your Honor. We'll  
9 just present what should be an agreed-upon order, hopefully,  
10 within the next week or so.

11 THE COURT: All right. Good. Thank you.

12 MS. DiFILLIPPO: Thank you --

13 MR. QURESHI: Thank you.

14 MS. DiFILLIPPO: -- your Honor.

15 THE COURT: All right. And then on the motion to  
16 reconsider.

17 (Colloquy not on the record.)

18 MR. QURESHI: Your Honor, just before we proceed with  
19 the motion for reconsideration, I just want to make sure  
20 because I didn't see it on the docket sheet outside that the  
21 other matter that was scheduled for today is the hearing with  
22 respect to the reorganized debtor's objections to the other two  
23 claims that Mr. Rhodes filed, the Greenway claim and the  
24 schedule of claims. That had been set for a hearing for  
25 today --

1                   THE COURT: Well, your stipulation wasn't exactly a  
2 modicum of clarity. The Greenway I'm aware of. But the other  
3 scheduled claims, where were the briefings on that?

4                   MR. QURESHI: They were briefed together.

5                   THE COURT: Oh, okay.

6                   THE CLERK: Do you know what docket number those are  
7 by any chance?

8                   (Colloquy not on the record.)

9                   MR. ANDERSON: 1466 is the supplemental brief of the  
10 reorganized debtors, and ours is 1463, and then I think there  
11 were reply briefs, 1470.

12                  THE COURT: So it was just the one brief on the  
13 Greenway. The Greenway brief covered everything, right?

14                  MR. ANDERSON: Correct.

15                  MR. QURESHI: Correct --

16                  THE COURT: Okay.

17                  MR. QURESHI: -- your Honor.

18                  THE CLERK: So the 1466, that objection should be on  
19 calendar today. Okay.

20                  THE COURT: So --

21                  THE CLERK: Now --

22                  THE COURT: But the problem is -- which is the order  
23 that you put this in? Oh, here it is, 1456 (sic).

24                  (Colloquy not on the record.)

25                  THE COURT: You never defined the words -- you

1 defined remaining claims -- you never defined the remaining  
2 claims. Oh, here it is. Okay. The status of the Greenway and  
3 the scheduled. Okay.

4 You know, when you draft these things, draft them with a  
5 little bit more clarity because the CAs are trying -- I picked  
6 this up because I knew it was there.

7 But I didn't bother to tell the vCal people because  
8 it's -- you know, you got to be a little clearer, I mean,  
9 because when the people are trying to docket this how are they  
10 going to tell what the, quote, "remaining claims" are? So be a  
11 little better on that.

12 MR. QURESHI: Understood, your Honor.

13 THE COURT: Okay. All right.

14 THE CLERK: Do you want --

15 THE COURT: So on the motion to reconsider.

16 MR. ANDERSON: Yes, your Honor. This is Mr. Rhodes'  
17 motion to reconsider the tax-claim issue.

18 THE COURT: Now, were you counsel the first time  
19 around?

20 MR. ANDERSON: For --

21 THE COURT: On this one?

22 MR. ANDERSON: Yeah. Not in the very beginning, we  
23 were not, but we've --

24 THE COURT: It --

25 MR. ANDERSON: We've --

1 THE COURT: It wasn't you that argued this motion,  
2 though. Another counsel argued the motion.

3 MR. ANDERSON: No. I argued it previously to this  
4 Court.

5 THE COURT: Oh, okay.

6 MR. ANDERSON: Yeah. And was it in November --

7 MR. QURESHI: I think --

8 MR. ANDERSON: -- of --

9 MR. QURESHI: -- it was in November.

10 THE COURT: Okay.

16 And your Honor asked, and I don't think I made it clear  
17 enough, and I don't think that we had focused specifically  
18 enough on what has been briefed in the reconsideration which is  
19 that a declaration of a dividend or a distribution of an LLC  
20 does create an enforceable right.

21 And that was the issue that the Court was looking for  
22 before was where was the enforceable right. The enforceable  
23 right comes up in the context of the fact that there was a  
24 declaration made.

25 And the fact that we have a closely-held corporation and

1 group of entities, LLCs, controlled by Mr. Rhodes, it is  
2 admittedly not a formal declaration.

3 As indicated in our brief, a formal declaration is not  
4 required in Nevada. We have Mr. Rhodes' declaration where he  
5 states that prior to the petition date that he made the  
6 declaration.

7 We've previously argued in a slightly different context  
8 the fact that the tax claims had been performed previously. In  
9 fact, going back to 2006, there was some reimbursement to  
10 Mr. Rhodes of the 2006 tax payments. The net amount that was  
11 due and owing at the end of 2006 is the 6,974,159.

12 That amount plus intervening penalties and interest up to  
13 the petition date constitutes the total that is in the proof of  
14 claim.

15 It's our position that this should adequately respond to  
16 the Court's search for an enforceable claim by Mr. Rhodes. The  
17 question of insolvency I think is not yet ripe at this point in  
18 time because the declaration of the distribution happened  
19 sometime prior to the petition date.

20 So the fact that the debtor entities were insolvent as of  
21 the petition date I don't think is an adequate response from  
22 the reorganized debtors.

23 THE COURT: Well, you don't have anything to rebut  
24 that concerning solvency. You're not even clear when it was  
25 declared.

1 MR. ANDERSON: Well, we have Mr. Rhodes' declaration  
2 that it happened prior to the petition date.

3 THE COURT: Right.

4 MR. ANDERSON: We --

5 THE COURT: But prior when?

6 MR. ANDERSON: Well, we have the supporting schedule  
7 with the proof of claim that Mr. Rhodes put into evidence  
8 through his declaration that shows that in 2006 there had been  
9 -- of 21,000,000 in taxes, that he had been -- pursuant to that  
10 distribution, he had been reimbursed 14,000,000 just leaving a  
11 net of approximately 7,000,000, but your Honor is correct. His  
12 declaration does not give a specific date --

13 THE COURT: Which is very convenient.

14 MR. ANDERSON: -- of when the distribution was.

15 THE COURT: Okay.

16 MR. ANDERSON: If there are no other questions, I  
17 know your Honor --

18 THE COURT: Okay.

19 MR. ANDERSON: -- is very familiar with all of this.

20 THE COURT: Okay.

21 MR. ANDERSON: Thank you.

22 THE COURT: All right. Thank you.

23 Response.

24 MR. QURESHI: Thank you, your Honor. Again, for the  
25 record, Abid Qureshi, Akin, Gump, Strauss, Hauer & Feld on

1 behalf of the reorganized debtors.

2       If I may, your Honor, first just address a procedural  
3 point that we did mention in the papers -- and I do believe  
4 it's important and worth mentioning -- when we originally came  
5 before this Court with respect to all three of these claims, a  
6 decision was made by the parties to bifurcate the tax claim and  
7 to argue the objection just with respect to the tax claim.

8       On the day that your Honor ruled from the bench denying  
9 that claim, your Honor posed the question to counsel would you  
10 like me to certify the ruling.

11       There was no response made and no motion filed to certify  
12 the ruling. What happened next was counsel for Mr. Rhodes  
13 filed a Notice of Appeal with respect to the tax claim.

14       Now, our view, your Honor, is that once the notice  
15 of appeal was filed this Court was divested of  
16 jurisdiction.

17       What next happened is we went back to Judge Zive for a  
18 mediation session with respect to the two remaining claims,  
19 Greenway and the scheduled claims.

20       (Ringing in courtroom at 09:45:53 a.m.)

21       MR. QURESHI: At that point, Mr. Rhodes determined  
22 that he did not want to proceed with respect to the appeal, and  
23 we entered into the stipulation.

24       My understanding, your Honor, of the stipulation was that  
25 it was a standstill. That the purpose of the stipulation was

1 simply to freeze everything in time, so that we could pursue  
2 the mediation, and no party would be prejudiced by that.

3 We certainly were very taken aback. When after filing a  
4 stipulation that withdrew the appeal and preserved Mr. Rhodes'  
5 right to continue with the appeal at a later date, we were  
6 frankly shocked when he filed a motion for reconsideration.  
7 That was not the purpose of the stipulation.

8 (Colloquy not on the record.)

9 MR. QURESHI: We certainly didn't enter into that to  
10 give Mr. Rhodes another shot at arguing the same issue before  
11 this Court, so I mention that by way of background, your Honor.

12 But I do think that this is not a motion for  
13 reconsideration that was filed in good faith in light of what  
14 we certainly perceived to be a clear agreement by the parties  
15 to enter into a standstill and not to create additional rights  
16 for Mr. Rhodes.

17 Your Honor, one more procedural issue if I may also  
18 address it, and that is what is the appropriate rule under  
19 which this motion for reconsideration is brought.

20 Mr. Rhodes says 7054(b) which is the provision that  
21 provides that with respect to an interlocutory order the Court  
22 can revise its order essentially whenever it likes.

23 There is no specific statutory criteria nor is there a  
24 deadline during which that must occur. Our view is that that  
25 rule is inapplicable here, and that what should be applied is

1 Rule 60(b) .

2 Now, again, I don't think, your Honor, that this  
3 procedural issue ultimately should affect the outcome today,  
4 but we did brief it, so I think I should mention it briefly.

5 Our reading of Rule 9014, 9014 is the provision that  
6 Mr. Rhodes relies upon as a hook to the application of  
7 Rule 7054.

8 And what Bankruptcy Rule 9014 says, your Honor, is that in  
9 contested matters it lists certain Part VII rules that will  
10 apply, and Rhodes is correct that Rule 54 is listed. It's  
11 listed as Rule 54(256) (phonetic) .

12 However, if your Honor then turns to Rule 7054, what  
13 your Honor will see is that it says Subsections A through C  
14 apply in adversary proceedings.

15 That leaves Subsection D which according to Rule 9014  
16 would still apply to a contested matter, so, again, our view,  
17 your Honor --

18 THE COURT: Well, but why doesn't 9014(c) make 7054  
19 applicable?

20 MR. QURESHI: It does make 7054 applicable,  
21 your Honor, but then when your Honor goes to 7054 what -- 7054  
22 has four parts, A, B, C, and D.

23 THE COURT: Right.

24 MR. QURESHI: And what 7054 says at the outset is A  
25 through C applies in adversary proceedings, so our reading of

1 it was that Subsection D is what applies in contested matters,  
2 but A through C is still what applies only in adversary  
3 proceedings which this is not.

4 THE COURT: Okay.

5 MR. QURESHI: But, again, your Honor, I don't think  
6 it is particularly dispositive to the outcome because I think  
7 either way the motion for reconsideration must fail, and it  
8 must fail for a couple of reasons.

9 First of all, your Honor, let there be no doubt. This  
10 issue was presented to the Court, was in their papers, and was  
11 argued.

12 As we point out in our opposition, your Honor, counsel at  
13 the initial hearing on this matter said the key issue for  
14 your Honor to focus on, the single fact that should change  
15 everything, is that there was a liability entered into the  
16 books and the records.

17 Clearly, what counsel was saying was a decision was made  
18 by the reorganized debtor to pay this dividend. It's reflected  
19 in the books and records. That should be determinative.

20 And that argument was made. That appeared in Mr. Rhodes'  
21 declaration, and it appeared very prominently in oral argument,  
22 and it's all over the transcript, and, again, we've quoted that  
23 back.

24 Now, your Honor, again, that fact is not what this Court  
25 focused on. What this Court focused on in the ruling was where

1 is the evidence in this record that a distribution was  
2 declared.

3 It doesn't say in Mr. Rhodes' declaration. All Mr. Rhodes  
4 says is sometime prior to the petition date I declared a  
5 dividend.

6 But there's not one iota of evidence that establishes that  
7 that occurred or when that occurred. It's simply Mr. Rhodes  
8 saying I declared a dividend.

9 And so in the motion for reconsideration, the one new  
10 statutory provision that is cited is the provision of the  
11 Nevada Revised Code that provides that when a dividend is  
12 declared, a valid dividend -- and that's an important point,  
13 your Honor -- but when a dividend is declared the beneficiary  
14 of that dividend, in effect, becomes a creditor of the company  
15 from which the dividend was declared. There is a right  
16 generated at that point to receive that dividend.

17 However, in our opposition, your Honor, we cite another  
18 provision of the same Nevada Revised Statute that, of course,  
19 says that a dividend, rather, cannot be made if the company is  
20 insolvent.

21 Now, at the last hearing, the position taken by the  
22 debtors was the books and records, the ledger entry that  
23 created an obligation owing from the debtors to Rhodes for  
24 \$9,000,000 and change, that is the evidence of there being a  
25 dividend which was payable to Mr. Rhodes.

1           And the date of that, your Honor, was the day before the  
2 petition date or on the petition date depending on the debtor  
3 entity. It was March 31 of 2009.

4           Clearly, one cannot escape the conclusion, your Honor,  
5 that on the petition date the debtor was insolvent. The  
6 first-day affidavit establishes it.

7           The first-day affidavit concedes that since 2008 the  
8 debtor was not able to pay its obligations when they became  
9 due.

10           Specifically, the first-day affidavit acknowledges that  
11 interest payments were not being made with respect to the  
12 first-lien debt and the second-lien debt, and it had not been  
13 made for many months in advance of the petition date, so how  
14 does Rhodes deal with that point in the reply?

15           Well, the reply is very sketchy in terms of when this  
16 dividend was declared, and what we are left with is sometime  
17 before the petition date.

18           So we don't know if it was the day before the entry was  
19 created on the books and records that shows that \$9,000,000 is  
20 payable to Mr. Rhodes or if it was a month before that or if it  
21 was six months before that. There's simply no evidence that a  
22 dividend was ever declared. There is just none in the record.

23           And the only piece of evidence upon which Mr. Rhodes has  
24 relied is again that entry in the books and records that  
25 \$9,000,000 was owing, and that entry of the day is not

1 disputed. It's the petition date or the day before the  
2 petition date.

3 And so I think, your Honor, it's fair for the Court to  
4 conclude that the only evidence as to when this dividend was  
5 supposedly declared was on the petition date.

6 And on the petition date, again, there is evidence this  
7 Court can take notice of in the form of the first-day affidavit  
8 that the company was insolvent.

9 And, therefore, the dividend to the extent that it was  
10 declared on that date was under Nevada law not effective, and  
11 no right on Mr. Rhodes' behalf to receive that dividend was  
12 declared or was established I should say.

13 In the initial hearing, your Honor, what Mr. Rhodes relied  
14 upon to establish that there was a dividend owing to him was  
15 the stipulated facts that the parties had submitted in advance  
16 of the original hearing on this matter.

17 And what those facts stipulated to, your Honor, was  
18 nothing more than the ledger entry on the petition date showing  
19 the \$9,000,000.

20 So in terms of the facts that are before your Honor as to  
21 when the dividend was declared, the only facts in the record  
22 are that the dividend was declared on or one day before the  
23 petition date.

24 Again, your Honor's basis for denying the claim the first  
25 time around was that there was no evidence whatsoever that a

1 dividend had ever been declared, and that has not changed.

2 There is absolutely nothing new that was presented in the  
3 motion for reconsideration, and so whether your Honor considers  
4 it under Rule 54(b) or under Rule 60(b) does not matter. In  
5 either event, the motion should be denied.

6 THE COURT: Okay.

7 MR. QURESHI: So unless the Court has any questions,  
8 that's all I have.

9 THE COURT: No, thank you. All right.

10 MR. QURESHI: Thank you.

11 THE COURT: Reply.

12 MR. ANDERSON: A couple of points, your Honor, if I  
13 might?

14 THE COURT: Go ahead.

15 MR. ANDERSON: Speaking to the standstill agreement  
16 of the stipulation, you know, there is a stipulation that did  
17 have a standstill agreement in it.

18 It clearly expired on February 15th, and it was after that  
19 point in time when we did the appeal on the brief. There's  
20 been no shenanigans, no hiding the fact.

21 We actually submitted the motion to reconsideration well  
22 in advance of the mediation, so that, you know, we could  
23 discuss the new issues that came up.

24 They had actually even been discussed at the first  
25 mediation, and then we did the reconsideration after the first

1 mediation.

2 I understand that it came as a surprise to Mr. Qureshi,  
3 and --

4 THE COURT: Well, why didn't you include this in your  
5 stipulation of July if it was so obvious?

6 MR. ANDERSON: In which --

7 THE COURT: Your July 14th stipulation if you were  
8 going to file your motion for reconsideration. When did you  
9 file --

10 MR. ANDERSON: I think we had filed it --

11 THE COURT: -- the motion?

12 MR. ANDERSON: We filed it in June I think.

13 THE COURT: Okay.

14 MR. ANDERSON: And so we had already had that, and  
15 it's the prior stipulation I think from March that set the  
16 schedule that --

17 THE COURT: Okay.

18 MR. ANDERSON: That after the February 15th  
19 conference that there was no more standstill on that  
20 issue.

21 And the Appellate Court, you know, by stipulation of the  
22 parties returned jurisdiction of this issue back to this court.  
23 I don't think that it was certified as a final order.

24 And that was the reason we dismissed the appeal was we  
25 were going to wait for a final order on all the proof of claim

1 issues and appeal at that point in time.

2 The main point I want to make on the substance of the  
3 claim is at no time in the prior and, you know, certainly not  
4 now has Mr. Rhodes asserted or have I argued that it was the  
5 entry of the obligation on the books and records that created  
6 the obligation. That is a misstatement and maybe is the fine  
7 distinction.

8 We always asserted that that reflected a course of  
9 conduct, and it reflected the fact that a declaration of the  
10 dividend or distribution had been made by Mr. Rhodes.

11 And, clearly, his declaration which is before the Court  
12 and is evidence before the Court states that that was done  
13 prior to the petition date.

14 The proof of claim attaches the spreadsheet on the claim  
15 detail that establishes that it was done well prior to the  
16 petition date. If your Honor --

17 THE COURT: Okay.

18 MR. ANDERSON: -- has no further questions --

19 THE COURT: All right. Thank you.

20 MR. ANDERSON: -- thank you.

21 THE COURT: Well, I'm going to deny the motion for  
22 reconsideration even insofar as I'm going to abide by my prior  
23 ruling.

24 With respect to the procedural grounds, there really isn't  
25 anything new except this gives the Court the opportunity to

1 articulate further reasons and articulate the basis of this  
2 aspect of the claim.

3 With respect to 54(b), whether or not 54(b) applies -- and  
4 I always understood the rule to mean that the provisions of  
5 9014 trumped the provisions of 54 because it was saying while  
6 it doesn't apply in the adversary this does apply.

7 But even if I'm wrong, 3008 allows reconsideration of  
8 claims at any time, and I don't think there's a ten-day limit  
9 under 3008.

10 Indeed, there's an appellate case, one of my cases I was  
11 affirmed on, in which I found that latches was an appropriate  
12 limitation, but, otherwise, there was no such limitation, so I  
13 think the motion for reconsideration can appropriately be  
14 brought.

15 Now, on the merits, it seems to me that the debtor has  
16 failed -- the debtor cannot merely -- the prior debtor, the  
17 insider -- excuse me -- Mr. Rhodes cannot rely on merely saying  
18 I'm entitled to these funds without showing that it was a valid  
19 dividend, and he has offered nothing in the record to show that  
20 it was a valid dividend.

21 We don't even get to the point where I think that it  
22 becomes a genuine issue of material fact if you will if you're,  
23 in essence, applying the rules of summary judgment because he's  
24 done nothing to show that, indeed, it was issued before 2008.

25 It would seem anomalous to me that he could be entitled to

1 a claim that would be if it was paid the day before a  
2 preference, if it was paid sometime before in '08 or even a  
3 fraudulent transfer if the debtor was insolvent, and that's  
4 just impossible to me.

5 But, again, under Nevada law, it has to be a valid  
6 dividend. It wasn't a valid dividend. There's been nothing to  
7 show that it was, so I'll deny that motion. All right.

8 Let's go to the Greenway.

9 MS. LAHAIE: Good morning, your Honor.  
10 Meredith Lahaie, Akin, Gump, Strauss, Hauer & Feld, for the  
11 reorganized debtors.

12 Before you today is the reorganized debtor's objection to  
13 the Greenway claims, in addition, your Honor, the reorganized  
14 debtor's request to the extent the Court deems it necessary for  
15 authorization to amend its schedules and remove certain  
16 scheduled claims as I'll discuss in greater detail.

17 Your Honor, something you said in your ruling on the  
18 motion for reconsideration I think is very applicable to what  
19 I'm about to say.

20 And what you said, generally speaking, your Honor, is that  
21 you cannot rely on merely stating I'm entitled to these funds  
22 without evidence that the underlying obligation is valid.

23 And, your Honor, I think that that ruling applies to each  
24 and every one of the claims that Rhodes is now asserting. So  
25 unless your Honor has opening questions, I'll turn first to the

1 Greenway claims.

2 THE COURT: Okay. Sure.

3 MS. LAHAIE: Your Honor, in connection with the proof  
4 of claim Rhodes filed in this case, Rhodes is seeking an  
5 allowed claim for compensation that he allegedly paid to  
6 three senior debtor executives, and those individuals were  
7 Frederick Chin, James Coyne, and Christopher Stephens.

8 And in Rhodes' actual proof of claim that he filed in  
9 2009, Rhodes lists the amount of the Greenway claim of  
10 \$868,849.

11 And before I, your Honor, turn to the merits of the  
12 Greenway claim, as set forth in what was our initial objection  
13 before this process was bifurcated --

14 THE COURT: I need to ask a basic question and pardon  
15 my ignorance, but Greenway's not a debtor.

16 MS. LAHAIE: It's not, your Honor.

17 THE COURT: Okay. So he's asking for money he paid  
18 to a nondebtor.

19 MS. LAHAIE: That's correct, your Honor.

20 THE COURT: Okay.

21 MS. LAHAIE: As your Honor is aware and as was  
22 briefed in connection with the opening objection that the  
23 reorganized debtors filed with respect to both the tax claim  
24 and the Greenway claim -- this was back in 2010. It's Docket  
25 No. 1149.

1           And starting on page 16, the reorganized debtors go  
2 through at great length what exactly the burden of proof is  
3 with respect to what a claimant must show in order to have a  
4 *prima facie* valid proof of claim.

5           And, your Honor, generally speaking, the standard is that  
6 the claim is deemed valid unless there's an objection. And  
7 once an objection is filed, the burden shifts back to the  
8 claimant to prove evidence or to prove facts that would  
9 underlie his proof of claim.

10          And, your Honor, Rhodes has not met his burden of proof  
11 with respect to any of the claims that he is now seeking before  
12 this Court.

13          Your Honor, specific with respect to the Greenway claim,  
14 you're going to hear a lot about something called the  
15 Main Amundson report. It's something that Rhodes relies on in  
16 connection with a number of these claims.

17          And before I talk about how the Main Amundson report does  
18 not establish an entitlement owing to Rhodes on account of the  
19 Greenway claim, just two facts about the Main Amundson report.

20          The first, your Honor, as I'm sure you're aware is that  
21 it's hearsay, and Rhodes' counsel has not identified any  
22 hearsay exception that would render its contents admissible.

23          The second thing, your Honor, upon information and belief,  
24 the Main Amundson report was not the product of an audit.  
25 Main Amundson did not conduct a full audit on this company.

1           And the contents of the Main Amundson report are simply  
2 the results of a partial investigation that Main Amundson  
3 concluded.

4           And, your Honor, Rhodes relies on the Main Amundson report  
5 to establish that he is entitled to the amount set forth in his  
6 proof of claim on account of the Greenway payments.

7           And, your Honor, as an initial matter, Main Amundson  
8 recognizes that Rhodes is entitled to approximately \$606,000 on  
9 account of the payments made to Greenway, but not the amount  
10 that Rhodes sets forth in his proof of claim which is almost  
11 \$270,000 more.

12           So notwithstanding the fact that the Main Amundson report,  
13 the document that Rhodes is relying on extremely heavily to  
14 support his entitlement to this claim, notwithstanding the fact  
15 that it fundamentally conflicts with the very dollar amount  
16 that he is now seeking, the fact that Main Amundson may  
17 acknowledge or may appear to acknowledge that Rhodes should be  
18 entitled to some amount on account of that claim does not  
19 substantiate and this did not create an obligation owing from  
20 the debtors to Rhodes.

21           As your Honor correctly stated, Greenway is a nondebtor  
22 entity. Rhodes has put no evidence before this Court. There  
23 is nothing in the record as to what exactly these individuals  
24 did, what portion of their services were performed for debtor  
25 entities versus nondebtor entities, whether their compensation

1 was market.

2           And, your Honor, what Rhodes has said is that this  
3 compensation structure was created in a way as to prevent the  
4 debtor's then current employees from reacting adversely to the  
5 compensation structure, and Rhodes cites that as some kind of  
6 indicia of this being an aboveboard transaction.

7           But, your Honor, if it was so aboveboard, there are no  
8 employment agreements that document these arrangements. There  
9 are no contracts, documents, evidence of any kind that would  
10 substantiate, A, Rhodes owing these amounts to the Greenway  
11 employees themselves or, B and more importantly for  
12 your Honor's purposes, anything that would obligate the  
13 reorganized debtors to reimburse Rhodes for those amounts.

14           In connection with the briefing, your Honor, I'm sure you  
15 observed that Rhodes also raises a number of equitable  
16 arguments that he claims entitle him both to the Greenway  
17 claims and in some instances are applicable to certain of the  
18 scheduled claims as I'll get into shortly.

19           He makes two equitable arguments with respect to Greenway.  
20 The first is he argues that under theories of promissory  
21 estoppel he should be entitled to assert the Greenway claim.

22           Your Honor, both of these equitable remedies are briefed  
23 in full in our papers. I'm happy to answer any questions, but  
24 I'm just going to hit on them extremely briefly.

25           Promissory estoppel is not available to Rhodes to

1 substantiate the Greenway claim for the simple matter that  
2 promissory estoppel requires among other things the existence  
3 of a promise that is clear and unambiguous.

4 Your Honor, there has been no evidence, no allegation,  
5 nothing in Rhodes' papers that the debtors made a clear and  
6 unambiguous promise to reimburse Rhodes for these amounts.

7 And, your Honor, what you may also hear from Rhodes'  
8 counsel after I sit down is that, well, Rhodes had obviously a  
9 very intimate relationship with the debtors.

10 He may have some testimony that he may elicit as to what  
11 promise may actually have been exacted between the company and  
12 Rhodes at that time.

13 But, your Honor, as Rhodes himself conceded in his reply  
14 brief that he filed very recently, Rhodes was at the time the  
15 CEO, the president, and the sole member of the board of  
16 directors.

17 And, your Honor, I cannot imagine that this equitable  
18 remedy would be enforceable in a situation where Rhodes would  
19 be, in effect, arguing that he made a promise to himself to  
20 repay these funds.

21 Your Honor, the second equitable argument he makes in  
22 connection with the Greenway claim is equitable estoppel.  
23 your Honor, equitable estoppel as I'm sure you're aware can be  
24 invoked if the party seeking to assert its rights engaged in  
25 inequitable conduct.

1                   Your Honor, Rhodes does not go into any details as to how  
2 this theory may be applicable to the facts of this case.

3 Presumably, he is not arguing that the debtors at the time he  
4 was in control of them engaged in any inequitable conduct.

5 Presumably, if he were to expound on this theory, he would  
6 articulate that somehow the reorganized debtors had engaged in  
7 inequitable conduct.

8                   But, your Honor, he does not describe what that conduct  
9 is, what it might have been, or provide any other justification  
10 as to why the reorganized debtors should not be allowed to  
11 proceed with its objection.

12                  Your Honor, another objection or another response that  
13 Rhodes makes that is equally applicable to a number of the  
14 claims that I'm going to address today is the fact that Rhodes  
15 made these payments both at the debtor's direction, and he made  
16 these payments, and that the payments were recorded in the  
17 debtor's books and records.

18                  And, your Honor, I'd like again to refer you to your own  
19 comments at the beginning of the hearing today with respect to  
20 what does and does not substantiate a claim.

21                  And that merely saying you're entitled to something is not  
22 evidence of an underlying obligation to be entitled to that  
23 claim.

24                  Your Honor, again, as I've said by stating that Rhodes was  
25 directed to perform something or directed to pay something,

1 Rhodes is, in effect, saying that he directed himself to do  
2 something, and that, your Honor, is not evidence of a legal  
3 obligation to a claim.

4 Further, your Honor, Rhodes argues with respect to a  
5 number of the claims that the mere fact the claims are included  
6 in the company's books and records should somehow be  
7 *prima facie* evidence that these claims are valid.

8 But, again, your Honor, the debtors were controlled  
9 by Rhodes at the time the books and records were  
10 prepared.

11 So, presumably, your Honor, either Rhodes himself made  
12 that entry or Rhodes directed someone at the company to make  
13 that entry requiring the company or at least in Rhodes' opinion  
14 requiring the company to repay Rhodes for these amounts.

15 And, your Honor, for all of these reasons because Rhodes  
16 simply has not provided any evidence of any legal justification  
17 to these funds, we do not believe that Rhodes should be  
18 allowed, you know, a claim for the Greenway claim.

19 Unless your Honor has any questions on Greenway, I'm going  
20 to turn briefly to the scheduled claims.

21 THE COURT: You know, on the scheduled claims, none  
22 of you filed any new briefs on these. These are all the old  
23 briefs on the Greenway, right?

24 MS. LAHAIE: On Greenway, your Honor?

25 THE COURT: I mean on this particular objection.

1 MS. LAHAIE: Your Honor, there was a round -- there  
2 was opening briefs that I believe were filed on the 19th and  
3 then reply briefs that were filed I believe on the 26th, both  
4 of July. Both sets of briefs addressed both the Greenway claim  
5 and the scheduled claims.

6 So at least with respect to the reorganized debtor's  
7 briefs, about the first half of the brief was Greenway, and the  
8 second half was the scheduled claims.

9 MR. ANDERSON: If your Honor means to say that I  
10 don't think it raised any really different issues, though, I  
11 think that they're essentially the same as our prior briefs --

12 THE COURT: Okay.

13 MS. LAHAIE: There's certainly --

14 MR. ANDERSON: -- in content --

15 MS. LAHAIE: -- a lot of overlap --

16 MR. ANDERSON: -- your Honor.

17 MS. LAHAIE: -- your Honor.

18 As, your Honor, there is a lot of overlap between the  
19 arguments raised in connection with Greenway and raised in  
20 connection with the scheduled claims.

21 THE COURT: When was your brief filed?

22 MS. LAHAIE: Your Honor, the first round of briefing  
23 was filed on July 19th, and it's Docket No. 1466, and,  
24 your Honor, the scheduled claims are also referred to by their  
25 individual claim numbers.

1           There are three of them. There is the Rhodes Homes  
2 Arizona claim, the Pinnacle Equipment claim, and then the  
3 Heritage Land litigation claim if that's helpful.

4           (Colloquy not on the record.)

5           MS. LAHAIE: Your Honor, Mr. Qureshi's also reminding  
6 me that these objections were also raised in connection with  
7 our opening objection which I referenced at the beginning of my  
8 remarks --

9           THE COURT: Right.

10           MS. LAHAIE: -- which was filed in 2010, and that's  
11 Docket No. 1149.

12           THE COURT: I focused on the Greenway, but not the  
13 other schedules. I don't know how that happened, so I prefer  
14 to continue the argument on those.

15           MS. LAHAIE: Okay.

16           THE COURT: So let's have a response on Greenway, and  
17 then we'll continue both, and you could do your reply to  
18 Greenway at the time we do both. That way I've got --

19           MS. LAHAIE: Okay.

20           THE COURT: I pretty much know the answer to  
21 Greenway, but I do want to look through it one more time.

22           MS. LAHAIE: Understood, your Honor.

23           THE COURT: Okay.

24           THE CLERK: Your Honor, how far out did you want --

25           THE COURT: Hold on.

1 THE CLERK: -- to continue it? Okay.

2 THE COURT: I'm going to have his opposition first.

3 MR. ANDERSON: Thank you, your Honor.

4 THE COURT: All right.

5 MR. ANDERSON: It --

6 THE COURT: Go ahead.

7 MR. ANDERSON: It is a difficult context when you  
8 have one individual who occupies the chief-executive positions  
9 of the entities and is also, you know, claiming that he is owed  
10 money in an individual capacity.

11 To give the Court some comfort that these are real events  
12 and that these are real dollars and these are legitimate  
13 claims, recall the context prior to the petition of the debtor  
14 entities, now the reorganized debtors, were part of a credit  
15 facility involving hundreds of millions of dollars,  
16 sophisticated banks. They were watching Mr. Rhodes' --

17 THE COURT: But Mr. Rhodes specifically kept some  
18 entities out of the bankruptcy presumably because they  
19 benefitted him.

20 MR. ANDERSON: Well, they were outside the credit  
21 facility, but presumably.

22 THE COURT: Okay. So where in the record anywhere is  
23 there a contract for Greenway, a benefit to these estates for  
24 that?

25 MR. ANDERSON: In the record, it is both in

1 Mr. Rhodes' testimony as to the purpose that he employed these  
2 individuals, and it is substantiated by the independent  
3 Main Amundson --

4 THE COURT: Well, why --

5 MR. ANDERSON: -- report.

6 THE COURT: Why isn't that hearsay?

7 MR. ANDERSON: The Main Amundson report is based on  
8 business records. It was a business-record report that is in  
9 the books and records. I think it clearly falls within the  
10 business-records exception.

11 This is not something that was created for purposes of  
12 litigation. This was an existing document well before the  
13 petition was filed.

14 And, again, this is something that Mr. Rhodes isn't doing  
15 to make himself happy. He's doing this because he has  
16 auditors, Deloitte & Touche, auditing his entities.

17 And he has to report and satisfy the concerns of  
18 Credit Suisse and other banks that have \$400,000,000 loaned to  
19 him, so, you know, these are substantiated to the extent that  
20 they can be, and they were at the time.

21 Granted, Mr. Rhodes is making agreements with himself.  
22 That's probably one of the bases for requiring the  
23 Main Amundson to review it.

24 Main Amundson does allocate between the work of these  
25 individuals between inside the facility and outside the

1 facility which is essentially the same as inside the  
2 reorganized debtors and outside the reorganized debtors.

3 And those amounts are -- they dispute the amount that the  
4 CFO came up with, and the Main Amundson report are the numbers  
5 that are relied on to come up with --

6 THE COURT: But why don't we have a contract?

7 MR. ANDERSON: -- the Greenway claim.

8 THE COURT: Why don't we have any agreement?

9 MR. ANDERSON: Because one wasn't created at the  
10 time. That's --

11 THE COURT: So --

12 MR. ANDERSON: There is no written agreement. There  
13 is no contract. It was Mr. Rhodes agreeing with Mr. Rhodes in  
14 two different capacities, and that transaction was reviewed  
15 essentially in real time prepetition as part of the  
16 Main Amundson review.

17 You know, if a CEO of a company can never make an  
18 agreement with himself as an individual when that agreement and  
19 the amounts paid under that agreement are not only audited by  
20 the auditors --

21 THE COURT: Well, but --

22 MR. ANDERSON: -- Deloitte & Touche --

23 THE COURT: But nobody's saying he can't make an  
24 agreement. It's just document it. It's just (indiscernible)  
25 convenient that all these agreements are not in writing after

1 he wants to file a proof of claim.

2 MR. ANDERSON: But the evidence of the performance of  
3 the agreement was all prepetition and all part of the books and  
4 records and the amounts.

5 THE COURT: But how is it? I mean --

6 MR. ANDERSON: The Main Amundson report was done  
7 prior to the petition. It was done for reasons unrelated to  
8 the bankruptcy. Deloitte & Touche was auditing the books  
9 prepetition unrelated to the bankruptcy.

10 Mr. Rhodes had to justify these issues to the credit  
11 facility prepetition and unrelated to the bankruptcy. And  
12 prepetition and unrelated to the bankruptcy, these agreements  
13 were made and, more importantly, they were performed.

14 Written agreements aren't necessary where you have  
15 performance, and everybody recognizes that the performance was  
16 made. There were some disputes about the actual accounting  
17 amounts. Those are resolved by the Main Amundson report.

18 As to the amount in the Main Amundson report, I think the  
19 606,000 is derived by error. That's the difference between  
20 what the CFO and what Main Amundson came up with.

21 And that's the total of the difference between the two on  
22 the total compensation paid, but that's not the basis for the  
23 amount of the claim.

24 There was over 2,000,000 paid, and Mr. Rhodes was  
25 reimbursed some of that leaving the balance as the 868,000 I

1 believe it was.

2 And that amount is -- you know, the substantiation for  
3 that is in Mr. Rhodes' declaration as to what the balance  
4 was.

5 THE COURT: Okay. All right.

6 MR. ANDERSON: Thank you.

7 THE COURT: All right. Well, let's continue this  
8 'til August 30th at --

9 THE CLERK: Do you want to do it at 1:30, your Honor?

10 THE COURT: Yes. All right.

11 So we'll see you then only on the -- I've decided the  
12 motion for reconsideration. We just have the remaining claims.

13 MR. QURESHI: And --

14 THE COURT: All right?

15 MR. QURESHI: -- would your Honor like any further  
16 briefing in respect --

17 THE COURT: I --

18 MR. QURESHI: -- to --

19 THE COURT: I don't. I will let you know if I do.

20 MR. QURESHI: Okay.

21 THE COURT: All right?

22 MR. QURESHI: Thank you.

23 THE COURT: Thank you.

24 THE CLERK: Okay. All rise.

25 (Court concluded at 10:20:45 a.m.)

1 I certify that the foregoing is a correct transcript  
2 from the electronic sound recording of the proceedings in  
3 the above-entitled matter.

4

5

6 /s/ Lisa L. Cline

08/08/11

7 Lisa L. Cline, Transcriptionist

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